

Served: July 15, 1992

NTSB Order No. EA-3614

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 1st day of July, 1992

BARRY LAMBERT HARRIS,  
Acting Administrator,  
Federal Aviation  
Administration,

Complainant,

v.

SE-10064  
SE-10182

ARNOLD A. GAUB,

Respondent.

OPINION AND ORDER

Respondent, pro se, has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, rendered at the conclusion of an evidentiary hearing on December 14, 1989.<sup>1</sup> Two complaints against respondent were consolidated for the purpose of appeal. The law judge affirmed a revocation order of the Administrator, as contained in one complaint, for respondent's alleged violation of sections 91.88(c), 91.90(b)(1)(i), and 91.9 of

---

<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached.

the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91) (now recodified at sections 91.130, 91.131, and 91.13, respectively) arising from two incidents of unauthorized entry into controlled airspace.<sup>2</sup>

Through the second complaint, the Administrator again sought revocation, alleging that respondent violated FAR section 61.19(f) by failing to remit his airman certificate

---

<sup>2</sup>The Administrator also alleged that respondent violated FAR section 91.85(b). The law judge, however, found that the facts did not support that particular allegation. The Administrator did not appeal this decision.

FAR sections 91.88(c), 91.90(b)(1)(i), and 91.9 read in pertinent part at the time of the incidents:

"§ 91.88 Airport radar service areas.

(c) Arrivals and overflights. No person may operate an aircraft in an airport radar service area unless two-way radio communication is established with the ATC facility having jurisdiction over the airport radar service area prior to entering that area and is thereafter maintained with the ATC facility having jurisdiction over the airport radar service area while within that area.

§ 91.90 Terminal Control Areas.

(b) Group II terminal control areas - (1) Operating rules. No person may operate an aircraft within a Group II terminal control area designated in Part 71 of this chapter except in compliance with the following rules:

(i) No person may operate an aircraft within a Group II Terminal Control Area unless he has received an appropriate authorization from ATC prior to operation of that aircraft in that area, and unless two-way radio communications are maintained, within that area, between that aircraft and the ATC facility.

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

to the FAA after the Board ordered a 60-day suspension for a previous FAR violation.<sup>3</sup> The law judge sustained the section 61.19(f) violation, but reduced the sanction to a 6-month suspension.<sup>4</sup>

After consideration of the briefs of the parties and the record below, the Board concludes that safety in air commerce or air transportation and the public interest require that the Administrator's orders be affirmed, as modified by the law judge. We adopt the findings of the law judge as our own.

Regarding the failure to surrender his commercial pilot certificate during the period of suspension, respondent claims that his inaction resulted from his belief that the Board's order would be automatically stayed while he had an appeal pending in federal circuit court. Respondent, however, points to no rule, law, or precedent that would lend support to his asserted belief that a specific request for a stay was not necessary. We think that given the language of the Board order mandating the surrender of his certificate,

---

<sup>3</sup>See Administrator v. Gaub, 5 NTSB 1653 (1986), where respondent received a 60-day suspension for operating an aircraft under VFR when the flight visibility was less, or at a distance from clouds that was less, than that prescribed for VFR weather conditions. He also operated within a control zone, beneath the ceiling when the ceiling was less than 1,000 feet, and without prior clearance. He was found to have violated FAR sections 91.105(a) and (c), and 91.9 (now recodified at sections 91.155(a) and (c), and 91.13, respectively).

<sup>4</sup>The Administrator did not appeal the reduction in sanction.

as well as the repeated advice of the Administrator, which should have convinced respondent that his belief was mistaken, respondent's argument that his failure to surrender his certificate should be excused as the product of an innocent mistaken view is unavailing.

The pertinent dates regarding the section 61.19(f) violation are not disputed. The Board's opinion and order, wherein respondent's certificate was suspended for 60 days, was served on December 22, 1986. The suspension was to begin 30 days after service of the order, with the physical surrender of the certificate to the FAA. Respondent was advised, in writing, by the FAA that his certificate must be forfeited during the suspension period, as the Board's order was not stayed.<sup>5</sup> Even if respondent genuinely believed that he had a right to retain his certificate until the final disposition of his case in the courts, his belief would not explain why he failed to submit his certificate until one year after the U.S. Court of Appeals for the Ninth Circuit

---

<sup>5</sup>The FAA sent respondent a letter apprising him of this fact on April 28, 1987. The U.S. Court of Appeals for the Ninth Circuit dismissed respondent's appeal on December 21, 1987. On February 7, 1988, the FAA again informed respondent that he must surrender his certificate. Respondent advised the FAA that he had petitioned the Court of Appeals for reconsideration and would submit his certificate if and when his petition was unsuccessful. The Court denied the petition on March 23, 1988. On March 1, 1989, respondent sent a photocopy of his certificate to the FAA, stating that the original had been lost in a theft. After being notified by the FAA that a reproduction was unacceptable, respondent found his original certificate and sent it to the FAA on March 30, 1989.

denied his petition for reconsideration. We believe the law judge had sufficient evidence to find that respondent violated FAR section 61.19(f). We will not disturb his decision.

The other order of revocation was sustained by the law judge. It read, in pertinent part:

- "1. You are now, and at all times mentioned herein were, the holder of Commercial Pilot Certificate No. 1464034.
2. On January 8, 1987, you, as pilot-in-command, operated Civil Aircraft N500CH, a Cessna Model 310R, in the vicinity of Las Vegas, Nevada.
3. On the occasion referred to herein, you operated N500CH within the Las Vegas Terminal Control Area (TCA).
4. You did not have authorization from air traffic control prior to your operation in the TCA.

\* \* \* \*

7. On or about November 6, 1987, you were the pilot-in-command of a Cessna 210 aircraft, Registration No. N 6181N, and you operated it at and in the vicinity of Beale Air Force Base, California.
8. You operated the aircraft within the Beale AFB Airport Radar Service Area without establishing two-way radio communications with air traffic control.
9. You operated the aircraft within the Beale AFB Airport Radar Service Area, without intending to land at Beale AFB, without authorization from air traffic control.
10. As a result of your operation of the aircraft within the Airport Traffic Area, the TRACON had to divert a T-38 military aircraft in order to avoid a collision with your aircraft."

In his appeal brief, respondent contends that the aforementioned allegations were not supported by sufficient

evidence. He also asserts that the law judge erred by denying his motion to continue the hearing and by refusing to allow him to present evidence of abusive prosecution tactics by the FAA.

Respondent argues that the law judge's conclusions were not based on a preponderance of the evidence. First, he asserts that the radar equipment in both the Las Vegas and Sacramento incidents was imprecise. He maintains that, in both incidents, the Administrator did not sufficiently prove respondent entered controlled airspace before obtaining clearance to do so.

Despite respondent's assertions, we believe that the Administrator presented both testimony and physical evidence proving by a preponderance the allegations. In his oral decision, the law judge sufficiently summarized the evidence, and we need not repeat it here. The evidence tends to show that respondent's aircraft had been clearly identified with radar in both instances, a fact that was testified to by an air traffic controller on duty at the time of each incident.

One controller testified that he was forced to divert a military aircraft from its intended route in order to prevent a midair collision between it and respondent's aircraft. We believe there was ample evidence, unrebutted by respondent, to indicate that on two separate occasions respondent acted carelessly by making an unauthorized entry into controlled airspace without establishing two-way radio contact.

Respondent claims the law judge prevented him from testifying and producing evidence of the Administrator's "pattern of abusive prosecution" of other airmen throughout the country. We find that, upon objection by the Administrator, the law judge properly excluded irrelevant documents from evidence. In a hearing of this nature, each party may present evidence necessary "for a full and true disclosure of the facts." See 49 C.F.R. § 821.38. A party does not have a right to submit extraneous material. The law judge appropriately limited the scope of the hearing to the violations alleged in the complaints.<sup>6</sup> He asked respondent several times if he wanted to testify. Respondent, however, chose to limit his testimony to simply identifying each exhibit that he sought to be admitted into evidence. In sum, we find no merit in respondent's contention that the law judge erroneously restricted his ability to testify or present other evidence.

Respondent's speculative assertion that the radar equipment utilized in both incidents was not functioning properly is meritless. He did not produce any evidence at

---

<sup>6</sup>Respondent also argues that his case was prejudiced by several of the law judge's remarks. In ruling on an objection, the law judge attempted to forestall respondent's illogical assertion that a transponder constituted a method of two-way communication. The law judge then mentioned that respondent was lucky the controllers were able to contact the military aircraft, and thereby avert a midair collision. These comments were harmless. They neither prejudiced respondent's case, nor reflected bias against respondent.

the hearing to substantiate his claim. The Administrator has no affirmative duty to prove that the radar was not faulty.

Administrator v. Hodges, NTSB Order No. EA-3546 (1992).

There is no reason to believe, based on the record, that the equipment was inaccurate.

Lastly, respondent argues that revocation is too severe a sanction for the infractions alleged, especially given the fact that revocation would destroy his means of earning a living. We acknowledge that revocation is a severe sanction, not to be meted out lightly. Yet, even without considering respondent's violation history, the violations herein established clearly demonstrate a lack of the "care, judgment, and responsibility" required of a certificate holder. Administrator v. Hilburn, 5 NTSB 2464, 2467 (1987).<sup>7</sup>

Consequently, the possibility that revocation may have an adverse economic impact on respondent is not a circumstance that we will consider, for an airman's use of his certificate to earn a living is not a mitigating factor where his qualifications are found wanting, as they have so clearly been in this case. See, e.g., Administrator v. Brown, NTSB Order No. EA-3008 (1989).

---

<sup>7</sup>See also Administrator v. Hock, 5 NTSB 892 (1986), where we found revocation to be an appropriate sanction for violations resulting from two separate incidents that, if viewed individually, may not have warranted revocation, but taken in the aggregate, suggested that the violations resulted not only from inadvertence, but also from a lax attitude toward safety.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The Administrator's revocation orders, as modified by the initial decision, are affirmed; and
3. The revocation of respondent's commercial pilot certificate shall commence 30 days from the date of service of this order.<sup>8</sup>

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

---

<sup>8</sup>For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).